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## IMMIGRATION CHALLENGES OF THE PAST DECADE AND FUTURE REFORMS

Fatma Marouf\*

### ABSTRACT

*Over the past decade, immigrants have faced numerous challenges in the United States, including a dramatic increase in deportations, the expansion and privatization of immigration detention, major changes to the asylum system combined with drastic cutbacks in refugee admissions, and a new wave of racism and xenophobia. This Article discusses these challenges and explores possible ways to address them in 2020 and beyond.*

### I. INTRODUCTION

In his Letter from a Birmingham Jail, Martin Luther King, Jr. wrote, “Anyone who lives inside the United States can never be considered an outsider.”<sup>1</sup> He was not talking about immigrants, but his prescient words describe the situation of countless immigrants today, whose legal status, race, ethnicity, or cultural background renders them outsiders in the land where they live. Fighting oppressive immigration laws and policies goes beyond the issue of legal status. It challenges the definition of “us” and “them,” pushing people to redefine who we think of as “American” and recognizing our broader, shared identities as human beings.

### II. INCREASED IMMIGRATION ENFORCEMENT

Immigration enforcement became a high priority under the Obama Administration and remains a key issue for the Trump Administration. During President Obama’s first term in office, the annual number of deportations reached a historic high of 409,849 in FY 2012.<sup>2</sup> The number of deportations fell

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1. Martin Luther King, Jr., *Letter from a Birmingham Jail*, MARTIN LUTHER KING, JR. RESEARCH & EDUC. INST., STANFORD UNIV. (Apr. 16, 1963), [http://okra.stanford.edu/transcription/document\\_images/undecided/630416-019.pdf](http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf) [<https://perma.cc/7RD9-MQ9L>].

2. News Release, U.S. Immigration & Customs Enft, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidelines

significantly during his second term in office, dropping to 240,255 in FY 2016.<sup>3</sup>

Under the Trump Administration, deportations have ranged from 226,000 in FY 2017 to 282,242 as of June 2019, remaining below peak levels under President Obama.<sup>4</sup> This corresponds to a drop in the number of apprehensions by the Department of Homeland Security (DHS). Between 2016 and 2017, the total number of apprehensions by DHS dropped by 13%,<sup>5</sup> due largely to fewer apprehensions along the southwest border, which decreased from 408,870 in 2016 to 303,916 in 2017.<sup>6</sup> However, the number of removals from the interior of the country was higher during the first two years of the Trump Administration as compared to the last two years of the Obama Administration, increasing by 30% from FY 2016 to FY 2018.<sup>7</sup>

Beyond the sheer number of deportations, other important shifts in immigration enforcement have occurred in recent years. These include: less clear enforcement priorities and very limited use of prosecutorial discretion under the Trump Administration compared to the Obama Administration; expansion of expedited removal; and increased involvement of state and local law enforcement agencies in immigration enforcement.

#### A. UNCLEAR PRIORITIES AND LOSS OF PROSECUTORIAL DISCRETION

The Obama Administration prioritized deporting people who committed serious crimes and recent arrivals with no criminal record.<sup>8</sup> Under President

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to Further Focus Resources (Dec. 20, 2012), <https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and> [<https://perma.cc/4QCB-5HQ7>].

3. News Release, U.S. Immigration & Customs Enft, DHS Releases End of Fiscal Year 2016 Statistics (Dec. 30, 2016), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics> [<https://perma.cc/8V5P-SCXM>].

4. Bob Fredericks, *ICE Claims More Illegals Were Deported Under Obama than Trump*, N.Y. POST (June 21, 2019, 2:20 PM), <http://nypost.com/2019/06/21/ice-claims-more-illegals-were-deported-under-obama-than-trump/> [<https://perma.cc/ZH6N-D58Z>].

5. KATHERINE WITSMAN, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2017, at 2 (2019) [hereinafter DHS ANNUAL REPORT 2017], [https://www.dhs.gov/sites/default/files/publications/enforcement\\_actions\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf) [<https://perma.cc/A4ZW-LGB4>]. DHS apprehended 460,000 noncitizens in 2017, down from 530,000 in 2016 and 680,000 in 2014. *Id.* at 4-5 & tbl.1.

6. *Id.* at 5 tbl.1.

7. Cristobal Ramón & Lucas Reyes, *Interior Enforcement Under the Trump Administration by the Numbers: Part One, Removals*, BIPARTISAN POLICY CTR. (June 19, 2019), <https://bipartisanpolicy.org/blog/interior-enforcement-under-the-trump-administration-by-numbers-part-one-removals/> [<https://perma.cc/RZ4B-2LFP>].

8. See Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion%281%29.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion%281%29.pdf) [<https://perma.cc/RLJ3-BDZW>]; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to ICE Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/8FE4-42LT>]; Memorandum from John Morton, Assistant Sec'y, U.S. Immigration & Customs Enft, to ICE Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>

Obama, DHS implemented a policy of exercising prosecutorial discretion in cases that did not fall within the administration's priorities.<sup>9</sup> The "Morton Memos" issued in 2010 and 2011 prioritized around 27% of the unauthorized population, and subsequent guidance issued in 2014 prioritized only about 13% of the 11.3 million unauthorized immigrants.<sup>10</sup> Consequently, thousands of cases were "administratively closed," meaning they were taken off immigration judges' dockets and not prosecuted.<sup>11</sup>

Under President Trump, DHS rescinded these Obama-era policies and issued a new policy that fails to identify clear enforcement priorities and greatly limits the exercise of prosecutorial discretion.<sup>12</sup> Although DHS's new policy discusses the removal of criminals, it provides no clear hierarchy as to whom should be deported. Furthermore, the policy does not define the range of criminal offenses included and even extends to individuals who have been charged with, but not yet convicted of, a crime. The Trump Administration's policy also stresses that no group will be exempted from enforcement through prosecutorial discretion. This shift has caused immigrant communities to live in terror.

Restoring clear removal priorities and encouraging U.S. Immigration and Customs Enforcement (ICE) attorneys to exercise prosecutorial discretion in the interests of justice would help reduce fear among immigrant communities and focus limited resources on deporting truly dangerous individuals.

#### B. THE EXPANSION OF EXPEDITED REMOVAL

The expansion of immigration enforcement over the past decade has relied heavily on the increased use of expedited removal as well as a similar but distinct process called reinstatement of removal.<sup>13</sup> Expedited removal proceedings allow DHS to remove individuals quickly without a court hearing. Reinstatement of removal allows DHS to reinstate a prior removal order if someone reenters the United States unlawfully. Under these procedures, noncitizens have the

[<https://perma.cc/9EL6-USA8>].

9. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft., to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/C7GT-RVCA>].

10. MARC R. ROSENBLUM, MIGRATION POL'Y INST., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 1 (July 2015), <https://www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement> (click "Download Report" button).

11. *Id.* at 4.

12. Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin McAleenan et al., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [<https://perma.cc/E6GN-D93G>] (stating that "prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of [noncitizens] from enforcement of the immigration laws" and that DHS "shall faithfully execute the immigration laws of the United States against all removable [individuals]" (emphasis added)); see also Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

13. See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 184 (2017).

opportunity to go before an immigration judge only if they (1) express a fear of persecution or torture, and (2) pass either a credible fear interview (expedited removal) or a reasonable fear interview (reinstatement of removal) conducted by an asylum officer.

Congress created expedited removal in 1996, giving DHS the discretion to apply it to individuals who (1) enter illegally or seek to gain entry through fraud or misrepresentation, and (2) have been continuously physically present in the United States for less than two years.<sup>14</sup> A DHS policy issued in 2004, however, limited the use of expedited removal to individuals apprehended within one hundred miles of the border who have not been continuously physically present for more than fourteen days.<sup>15</sup>

Under the Obama Administration, the number of expedited removals nearly doubled from 109,742 in FY 2010 to 192,417 in FY 2013.<sup>16</sup> Similarly, the number of reinstated removals increased from 124,624 in FY 2010 to 162,579 in FY 2013.<sup>17</sup> In FY 2013, expedited removals accounted for 44% of all removals, and reinstated removals accounted for another 38% of all removals. Thus, the vast majority of removals occurred through one of these processes that circumvent immigration courts. That did not change much during the initial years of the Trump Administration. In FY 2017, expedited removal accounted for 37% of all removals, and reinstatement accounted for 41% of all removals.<sup>18</sup>

However, expedited removal may soon become an even greater percentage of removals and increase the total number of removals from the United States. Soon after taking office, President Trump announced his plan to expand expedited removal.<sup>19</sup> In July 2019, DHS implemented that plan, issuing a notice in the Federal Register announcing an expansion of expedited removal applicable to individuals who entered illegally, through fraud or misrepresentation, and are apprehended *anywhere in the United States* within *two years* of entry.<sup>20</sup> Under this new policy, even individuals who have established families, homes, and businesses in the United States will be vulnerable to swift deportation without a chance to go before an immigration judge. This dramatic expansion of expedited removal is expected to affect an estimated 328,000 noncitizens.<sup>21</sup>

There are many concerns related to the use and expansion of expedited removal. First, the process moves so quickly that most people have no opportunity to consult with an attorney or gather evidence. Second, there are practical problems with Customs and Border Protection (CBP) officers failing to ask the

14. See 8 U.S.C. § 1225(b)(1)(A)(i), (iii) (2018).

15. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-01, 48,800 (Aug. 11, 2004).

16. See Ramón & Reyes, *supra* note 7.

17. DHS ANNUAL REPORT 2017, *supra* note 5, at 12 tbl.6.

18. *Id.* In 2017, DHS removed a total of 295,364 people; of these, 103,704 were expedited removals, 120,545 were reinstated removal orders, and 71,115 were all other removals. *Id.*

19. See Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).

20. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409-01, 35,414 (July 23, 2019).

21. NAT'L IMMIGRATION FORUM, EXPANDED EXPEDITED REMOVAL 2 (2019), <https://immigrationforum.org/wp-content/uploads/2019/07/Summary-of-Expedited-Removal-Expansion-FINAL.pdf> [<https://perma.cc/A3NX-NSSE>].

proper questions to determine if a noncitizen has a fear of persecution or torture, or even pressuring noncitizens to withdraw applications for admission.<sup>22</sup> Third, there is very limited review of an asylum officer's credible fear determination. A noncitizen can request review of an asylum officer's decision by an immigration judge, but the Immigration and Nationality Act significantly limits judicial review by a federal court.<sup>23</sup>

Limiting expedited removal, including revoking its most recent expansion, is necessary to protect basic procedural rights in the removal process and uphold fundamental due process. No one, but especially not individuals with substantial ties to the United States, should be subjected to deportation without adequate procedural protections. Expanding judicial review of expedited removal orders would also help ensure a fair and meaningful process.

### C. GREATER INVOLVEMENT OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES

The last decade is also characterized by a marked increase in the participation of state and local law enforcement agencies in immigration enforcement. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) laid the foundation for this cooperation by including a provision, Section 287(g), that allows the federal government to enter into written agreements with states and local governments to enforce some aspects of immigration law.<sup>24</sup> However, the program did not gain traction until after the 9/11 attacks, when the Department of Justice issued an opinion supporting the authority of state police to enforce immigration law.<sup>25</sup>

The first 287(g) agreement was signed in 2002, and the program continued to grow rapidly under the George W. Bush Administration.<sup>26</sup> At least two models of 287(g) programs emerged. Under the "task force model," deputized officers could inquire about immigration status after an arrest, while under the "jailhouse model," deputized officers identified noncitizens in local jails and transferred

22. See ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 19-23 (2016), <http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> [https://perma.cc/A7TC-LQ5T]; MARK HETFIELD ET AL., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS & RECOMMENDATIONS 4-6 (2005), [https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf) [https://perma.cc/KXP6-YVWX].

23. See 8 U.S.C. § 1252(a) (2018).

24. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, § 287(g), 110 Stat. 3009-546, 3009-563 to -564 (codified at 8 U.S.C. § 1357(g)).

25. Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1722 (2018) (citing Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John Ashcroft, Attorney Gen., U.S. Dep't of Justice, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), <https://www.aclu.org/sites/default/files/FilesPDFs/ACF27DA.pdf> [https://perma.cc/Y2EG-YCFX]).

26. Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. MIGRATION & HUM. SECURITY 645, 648 (2017).

them to immigration detention centers.<sup>27</sup> A hybrid model was also established that combined the task force and jailhouse models.<sup>28</sup>

The 287(g) program continued to expand under the first few years of the Obama Administration, involving around seventy state and local agencies at its peak. However, the Obama Administration then reversed course. In 2012, Obama ended both the task force model and the hybrid model due to concerns about racial profiling.<sup>29</sup> Funding for the 287(g) program was cut by two-thirds and the number of participating law enforcement agencies fell by over half.<sup>30</sup> That same year, the Supreme Court issued its decision in *Arizona v. United States*, which held that several sections of an Arizona state law were preempted by federal immigration law<sup>31</sup> but left intact a provision that permitted local law enforcement to investigate a person's immigration status.<sup>32</sup>

Under President Trump, 287(g) programs have more than doubled in number, reaching a historic high of seventy-nine participating agencies in 2018, one-third of them in Texas.<sup>33</sup> There are currently seventy-five law enforcement agencies participating in 287(g) programs.<sup>34</sup> During the first sixteen months of the Trump Administration, over 12,000 noncitizens were deported under the 287(g) program—over 2.5 times the number deported pursuant to that program during the last sixteen months of the Obama Administration.<sup>35</sup> The 287(g) agreements formed under Trump also embrace the task force model that Obama had phased out in 2012, rather than the traditional jailhouse model.<sup>36</sup>

In January 2017, Trump also resurrected the Secure Communities program,<sup>37</sup>

27. *Id.*

28. *Id.*

29. *Id.* at 647.

30. The Data Team, *Under Donald Trump, More Cops Are Acting as Immigration-Enforcement Agents*, *ECONOMIST* (July 27, 2018), <https://www.economist.com/graphic-detail/2018/07/27/under-donald-trump-more-cops-are-acting-as-immigration-enforcement-agents> [https://perma.cc/A734-MJ7F].

31. *Arizona v. United States*, 567 U.S. 387, 403, 407, 410 (2012).

32. *Id.* at 415.

33. The Data Team, *supra* note 30; see also DAVID SCOTT FITZGERALD ET AL., CTR. FOR COMPARATIVE IMMIGRATION STUDIES, *MEXICAN IMMIGRANTS FACE THREATS TO CIVIL RIGHTS AND INCREASED SOCIAL HOSTILITY* 36 (Feb. 28, 2019), [https://ccis.ucsd.edu/\\_files/conference\\_papers\\_present/CNDH-final-3.4.19.pdf](https://ccis.ucsd.edu/_files/conference_papers_present/CNDH-final-3.4.19.pdf) [https://perma.cc/6VTV-V2KF].

34. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/287g> [https://perma.cc/6TAC-U48W] (last visited Oct. 29, 2019).

35. Claudia Flores, *A Controversial ICE Program and the Decision Facing Localities This June*, CTR. FOR AM. PROGRESS (May 16, 2019, 5:00 AM), <https://www.americanprogress.org/issues/immigration/news/2019/05/16/469871/controversial-ice-program-decision-facing-localities-june/> [https://perma.cc/EZH2-PYH5]; *Immigration and Customs Enforcement Arrests: ICE Data Through May 2018*, TRAC IMMIGRATION, SYRACUSE UNIV., <https://trac.syr.edu/phptools/immigration/arrest/> (click "By Fiscal Year" under "Graph Time Scale"; then select "All" under "State"; then select "All" under "County/Surrounding Area"; then select "287(g) Program" under "Apprehension Method/Agency") (last visited Oct. 10, 2019).

36. Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1255 (2018).

37. Exec. Order No. 13,767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793, 8801 (Jan. 25, 2017).

which was established in 2008 by the Bush Administration and then terminated in 2014 under the Obama Administration because of concerns that the program targeted low-level offenders who only committed traffic violations.<sup>38</sup> Under Secure Communities, state and local police share the fingerprints of arrested individuals with the Federal Bureau of Investigation (FBI) and ICE. If it turns out that someone is deportable, ICE issues a detainer, which is a request for the local jail to hold the individual for forty-eight hours until ICE takes custody. The Secure Communities program led to the deportation of approximately 320,000 people under the Bush and early Obama Administrations.<sup>39</sup> Under the Trump Administration, the program led to the deportation of approximately 6,200 people per month during the first nine months.<sup>40</sup>

Ending 287(g) cooperation agreements and terminating Secure Communities would protect against racial profiling and help restore immigrant communities' trust in law enforcement. It would also help ensure that Fourth Amendment rights are not violated by detention without probable cause.

#### D. THE SURGE OF "SANCTUARY" AND "ANTI-SANCTUARY" LAWS AND POLICIES

At the same time, Trump has launched an unprecedented attack on so-called "sanctuary" cities.<sup>41</sup> While sanctuary policies have existed for decades, they proliferated after 2011 in response to the rise in deportations of noncitizens with minor or no criminal records.<sup>42</sup> Shortly after his election in 2017, Trump signed an executive order announcing that he would cut federal funding to sanctuary cities.<sup>43</sup> However, his efforts to defund states like California and cities like New York and Chicago were unsuccessful, as courts blocked them on federalism and anti-commandeering grounds.<sup>44</sup> Currently, seven states and nearly two hundred counties and cities have adopted sanctuary laws or policies that limit cooperation with ICE and restrict ICE's access to local resources.<sup>45</sup>

But there is also a trend in the opposite direction, with states passing "anti-sanctuary" laws to prohibit cities and counties from adopting sanctuary policies. At least seven states have passed such laws, including Texas, Alabama, Indiana,

38. FITZGERALD ET AL., *supra* note 33, at 38.

39. *Id.*; see also *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/secure-communities> [<https://perma.cc/W8QK-P9RQ>] (last updated Mar. 20, 2018).

40. *Deportations Under ICE's Secure Communities Program*, TRAC IMMIGRATION, SYRACUSE UNIV. (Apr. 25, 2018), <http://trac.syr.edu/immigration/reports/509/> [<https://perma.cc/H3HP-T969>].

41. See generally Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008).

42. FITZGERALD ET AL., *supra* note 33, at 40.

43. Exec. Order No. 13,767, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793, 8799, 8801 (Jan. 25, 2017).

44. Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 853 (2019); see also, e.g., *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018).

45. Marc Rod, *'Sanctuary' Policies Can Limit but Won't Stop Trump Deportation Plans*, CNBC (June 21, 2019, 12:50 PM), <https://www.cnbc.com/2019/06/21/sanctuary-policies-wont-stop-trumps-deportation-plans.html> [<https://perma.cc/4X45-J7V9>].



Iowa, Mississippi, North Carolina, and Tennessee.<sup>46</sup> These state anti-sanctuary laws have fared better in courts. For example, the Fifth Circuit upheld Texas's law, called SB4.<sup>47</sup>

In May 2019, Trump announced a new program—the Warrant Service Officer Program—to bolster his attack against sanctuary cities. This program provides a more limited form of cooperation than the 287(g) program but makes it easier to participate, requiring officers to receive only a single day of training and relieving them of the responsibility to interview detainees to determine their immigration status.<sup>48</sup> It allows local law enforcement agencies to arrest and temporarily detain noncitizens on behalf of ICE even if local policies prohibit doing so, giving ICE forty-eight hours to take the noncitizens into federal custody.<sup>49</sup>

In addition to challenging anti-sanctuary laws and attacks on sanctuary laws and policies in court, immigrant rights advocates and organizers should continue building coalitions and applying public pressure on states and localities to protect immigrant communities.

### III. THE EXPANSION AND PRIVATIZATION OF IMMIGRATION DETENTION

Besides increased enforcement, one of the biggest challenges for noncitizens during the past decade was the expansion of immigration detention. IIRIRA and the Antiterrorism and Effective Death Penalty Act both passed in 1996, greatly expanding the categories of offenses that result in mandatory detention.<sup>50</sup> When immigration detention is statutorily mandated, individuals are not eligible for release on bond. In nonmandatory cases, ICE has discretion to release someone on bond or to utilize an alternative to detention, such as electronic monitoring.<sup>51</sup> Although alternatives to detention are much less expensive than detention and have proven highly effective, ICE prefers keeping noncitizens detained because their cases move faster and it is easier to execute a deportation at the end of the process.<sup>52</sup>

In FY 1994, before IIRIRA, the average daily detained population was only

46. Gulasekaram et al., *supra* note 44, at 839–40.

47. *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018).

48. Abigail Hauslohner, *ICE Provides Local Police a Way to Work Around 'Sanctuary' Policies, Act as Immigration Officers*, WASH. POST (May 6, 2019, 5:19 PM), [https://www.washingtonpost.com/immigration/ice-provides-local-police-a-way-to-work-around-sanctuary-policies-act-as-immigration-officers/2019/05/06/f651ff38-7029-11e9-9eb4-0828f5389013\\_story.html](https://www.washingtonpost.com/immigration/ice-provides-local-police-a-way-to-work-around-sanctuary-policies-act-as-immigration-officers/2019/05/06/f651ff38-7029-11e9-9eb4-0828f5389013_story.html) [https://perma.cc/MXK8-VQ7D].

49. *Id.*

50. Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices*, 5 J. ON MIGRATION & HUM. SECURITY 452, 454 (2017).

51. See generally Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141 (2017).

52. John Burnett, *'Alternatives to Detention' Are Cheaper than Jail, but Cases Take Far Longer*, NAT'L PUB. RADIO (July 18, 2018, 4:24 PM), <https://www.npr.org/2018/07/18/629496174/alternatives-to-detention-are-cheaper-than-jails-but-cases-take-far-longer> [https://perma.cc/GP84-V2D3].

6,785.<sup>53</sup> By FY 2000, it had increased to 19,458.<sup>54</sup> The Obama Administration significantly expanded the use of immigration detention. By FY 2010, the daily detained population was 30,885.<sup>55</sup> This expansion continued even more rapidly under the Trump Administration. In 2019, the average daily detained population exceeded 50,000.<sup>56</sup> Annually, the number of immigration detainees has doubled from around 200,000 in 2002 to over 400,000 in the past decade.<sup>57</sup> To support this expansion of detention, ICE's budget for custody operations increased from around \$864 million in FY 2005 to \$1.8 billion in FY 2010 to \$3.1 billion in FY 2018.<sup>58</sup>

One of the factors underlying the expansion of detention under the Obama and Trump Administrations is the so-called "bed mandate."<sup>59</sup> Since 2009, congressional appropriations for DHS have specified the number of immigration-detention beds that DHS should maintain, establishing an informal quota for detention.<sup>60</sup> In 2018, Congress specified a mandate of 40,500 beds.<sup>61</sup> In 2019, the Trump Administration requested funding for 52,000 beds, but a congressional deal between Democrats and Republicans maintained funding at the 2018 level.<sup>62</sup> Nevertheless, ICE managed to use its resources to detain over 50,000 noncitizens per day in 2019.<sup>63</sup>

ICE is only able to detain this many people by relying on private companies that not only lobby for the bed mandate but also make detention on this scale practically feasible.<sup>64</sup> Over 70% of immigration detainees are now held in privately operated facilities.<sup>65</sup> In some cases, ICE contracts directly with private companies

53. J. Rachel Reyes, *Immigration Detention: Recent Trends and Scholarship*, CTR. FOR MIGRATION STUDIES (Oct. 6, 2019), <https://cmsny.org/publications/virtualbrief-detention/> [https://perma.cc/3U3F-KE22].

54. *Id.*

55. *Id.*; see also Katharina Buchholz, *Number of Immigrant Detainees Rises Quickly*, STATISTA (Jan. 3, 2020), <https://www.statista.com/chart/17977/number-of-detainees-in-facilities-of-dhs-immigration/> [https://perma.cc/5TXU-NPTQ].

56. Reyes, *supra* note 53.

57. *Id.*

58. *Id.*

59. See Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 85–88, 90–97 (2017).

60. Nick Miroff, *Why Immigration Detention Beds Became a New Issue in Trump Border Wall Fight*, WASH. POST (Feb. 12, 2019), [https://www.washingtonpost.com/national/why-immigration-detention-beds-are-the-new-front-in-trump-border-wall-fight/2019/02/11/9c8e6d2a-2e15-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/national/why-immigration-detention-beds-are-the-new-front-in-trump-border-wall-fight/2019/02/11/9c8e6d2a-2e15-11e9-813a-0ab2f17e305b_story.html) [https://perma.cc/XE5C-7FLF].

61. *Id.*

62. *Id.*

63. *Id.*

64. See David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224, 224 (2019); Sinha, *supra* note 59, at 90; Sharita Gruberg, *Trump's Executive Order Rewards Private Prison Campaign Donors*, CTR. FOR AM. PROGRESS (June 28, 2018, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2018/06/28/452912/trumps-executive-order-rewards-private-prison-campaign-donors/> [https://perma.cc/S863-X68L]; Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), <https://www.migrationpolicy.org/print/16180#.xaTdKudKib8> [https://perma.cc/AAE3-YQ9D].

65. Rubenstein & Gulasekaram, *supra* note 64, at 225.

to operate detention facilities.<sup>66</sup> In other cases, ICE contracts with state or local governments—or, less commonly, with the U.S. Marshals Services—which then subcontract with private companies.<sup>67</sup> The privatization of detention poses many challenges. Since constitutional and administrative protections may not apply to private companies, privatization makes it harder to bring legal challenges to detention conditions. Additionally, ICE has not held its contractors (and subcontractors) accountable for failing to enforce ICE's own detention standards and often does not even include a quality-assurance surveillance plan in its contracts.<sup>68</sup> In recent years, inadequate detention conditions for families and children in particular have attracted widespread criticism.

Ending the use of privatized detention may seem farfetched, but the Executive Branch committed to do so once before under President Obama. In 2016, the Obama Administration announced that it would phase out the use of private for-profit prisons for federal inmates.<sup>69</sup> A future Administration could similarly decide to phase out the use of privatized immigration detention facilities. States can also decide to end privatized detention. For example, California recently decided to phase out private immigration detention centers.<sup>70</sup>

Additionally, the United States should stop detaining children and families. Relying more on alternatives to detention, including community case management programs, would reduce costs for the government while protecting immigrants' rights and promoting compliance with court procedures. Detention should be used only as a last resort, consistent with human rights norms. Going even further, it is worth examining what would happen if we shifted the enormous resources currently being poured into immigration enforcement and detention into providing health insurance, work authorization, in-state tuition, and federal student loans to all immigrants in order to maximize our collective social and economic well-being.

#### IV. DISMANTLING THE U.S. ASYLUM AND REFUGEE SYSTEMS

A third major shift over the last decade, specifically under the Trump Administration, involves radical changes to the asylum process and dramatic cuts in refugee admissions that threaten to undermine the entire system of surrogate protection. These changes take many forms, affecting credible fear interviews

66. *Id.*

67. *Id.* at 225–26.

68. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-19-18, ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 7–12 (2019); see also Katie Sullivan & Jeff Mason, *Immigration Detention in the United States: A Primer*, BIPARTISAN POLICY CTR. (Apr. 24, 2019), <https://bipartisanpolicy.org/blog/immigration-detention-in-the-united-states-a-primer/> [https://perma.cc/TEP5-KCVW].

69. See Memorandum from Sally Q. Yates, Deputy Attorney Gen., to Acting Dir., Fed. Bureau of Prisons, Reducing Our Use of Private Prisons (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download> [https://perma.cc/3AMY-7JVV].

70. Steve Gorman, *California Set to End Private Prisons and Immigrant Detention Camps*, REUTERS (Oct. 9, 2019, 3:57 PM), <https://www.reuters.com/article/us-california-prisons/california-set-to-end-private-prisons-and-immigrant-detention-camps-idUSKBN1WO2OZ> [https://perma.cc/EZF4-MT88].

conducted by asylum officers, removal proceedings in immigration court, and policies aimed at deterring migrants from seeking asylum in the United States. The frequency, speed, and combination of these changes exacerbate their impact.

To begin with, the Trump Administration has cracked down on credible fear interviews by issuing revised training materials for the asylum officers who conduct them.<sup>71</sup> These training materials impose a heightened, harsher standard to establish a credible fear of persecution, resulting in a decrease in credible fear findings. Additionally, DHS is beginning to use frontline CBP officers to conduct credible fear interviews, instead of relying exclusively on asylum officers who are trained in the intricacies of asylum law.<sup>72</sup>

The asylum system was further eroded by former Attorney General Sessions, who interfered in immigration adjudication in an unprecedented way, deciding as many immigration cases in one year as the attorneys general under Bush and Obama did during eight-year periods.<sup>73</sup> The decisions issued by Sessions, which represent the highest level of agency adjudication, seek to speed up removal proceedings and deportations by making it harder to have a case administratively closed, receive a continuance, or pursue certain types of asylum claims involving persecution by non-state actors, such as cases involving domestic violence or gang-related harm.<sup>74</sup> In fact, Sessions overruled the Board of Immigration Appeals's only precedent granting asylum in a case involving domestic violence.<sup>75</sup> A more recent decision by Attorney General Barr similarly makes it harder to establish eligibility for asylum in cases based on family relationships.<sup>76</sup>

For the first time in history, former Attorney General Sessions also imposed quotas on the number of cases that immigration judges are expected to decide each year, tying their performance evaluations to those quotas as a way of pressuring them into making faster decisions.<sup>77</sup> The National Association of Immigration Judges opposed these changes, arguing that they were being treated as enforcement officers rather than neutral decision-makers.<sup>78</sup>

On top of these changes, the Trump Administration adopted various policies

71. Mica Rosenberg & Kristina Cooke, *New Training Document for Asylum Screenings Reflects Tougher U.S. Stance*, REUTERS (May 4, 2019, 12:00 PM), <https://reuters.com/article/us-usa-immigration-asylum-exclusive/exclusive-new-training-document-for-asylum-screenings-reflects-tougher-u-s-stance-idUSKCN1SA0LG> [https://perma.cc/PG75-AGP5].

72. Camilo Montoya-Galvez, *Border Patrol Agents Now Screening Migrants for "Credible Fear" Under Controversial Pilot Program*, CBS NEWS, <https://www.cbsnews.com/news/us-border-patrol-cbp-agents-now-screening-migrant-families-for-credible-fear-under-controversial-pilot-program/> [https://perma.cc/3MBK-Y42L] (last updated Sept. 20, 2019, 5:57 PM).

73. Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 743-44 (2019).

74. See, e.g., *L-A-B-R- et al.*, 27 I. & N. Dec. 405 (A.G. 2018); *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018); *E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018).

75. *A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).

76. See *L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).

77. Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NAT'L PUB. RADIO (Apr. 3, 2018, 1:09 PM), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges> [https://perma.cc/W2QB-G9N7].

78. See Liz Robbins, *In Immigration Courts, It Is Judges vs. Justice Department*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/nyregion/nyc-immigration-judges-courts.html> [https://perma.cc/6RX6-T6G2].

aimed at deterring migrants from seeking asylum in the United States. These included separating families; criminally prosecuting migrants, including asylum seekers, under a “zero tolerance” policy; creating harsh detention conditions; and prolonging the detention of children. Other policies aimed at deterrence involve keeping asylum seekers outside the country. For example, the policy of “metering” asylum seekers at ports of entry, which was implemented on a small scale in certain locations under Obama, has spread across the entire southwest border under Trump.<sup>79</sup> Metering involves making asylum seekers wait in Mexico for weeks or months until there is enough “room” at the port of entry to apply for asylum.

The Trump Administration also initiated the so-called Migrant Protection Protocols, which involve returning non-Mexican asylum seekers to Mexico to wait there for their immigration court proceedings after they have passed a credible fear interview.<sup>80</sup>

Furthermore, in July 2019, the Trump Administration issued a “transit rule” that bars noncitizens from applying for asylum in the United States if they have crossed through a third country without applying for asylum there.<sup>81</sup> The rule does not require the transit country to be safe and has only very limited exceptions. In September 2019, the Supreme Court allowed the transit rule to go into effect while litigation against it continued in the lower courts.<sup>82</sup> This transit rule builds on an earlier rule, published in 2018, that renders people ineligible for asylum if they entered the United States outside a port of entry.<sup>83</sup> That rule never took effect because it was stayed and then vacated by federal courts.<sup>84</sup>

President Trump is also seeking to enter into “safe third country” agreements with a number of countries, most notably Mexico and Guatemala.<sup>85</sup> These agreements would require asylum seekers who travel through a country that is a party to the agreement to apply for asylum there before applying in the United States. In July 2019, Trump announced that he had entered into a safe third country agreement with Guatemala,<sup>86</sup> but it appears the agreement was not

79. Dara Lind, *The US Has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam Is Breaking.*, VOX (Nov. 28, 2018, 7:00 AM), <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports> [https://perma.cc/32Z6-ZD7B].

80. The Ninth Circuit recently held that the so-called “Remain in Mexico” policy is legally invalid. *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020). The Supreme Court subsequently granted the Administration’s application for stay, allowing the policy to stay in effect while the litigation continues. *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432, at \*1 (U.S. Mar. 11, 2020) (mem.).

81. Asylum Eligibility and Procedural Modification, 84 Fed. Reg. 33,829-01, 33,835 (July 16, 2019) (to be codified at 8 C.F.R. pts. 208, 1003, 1208).

82. *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (mem.).

83. See *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protections Claims*, 83 Fed. Reg. 55,934, 55,939 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1208).

84. See *Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (mem.); *O.A. v. Trump*, 404 F. Supp. 3d 109, 154 (D.D.C. 2019).

85. Kirk Semple, *The U.S. and Guatemala Reached an Asylum Deal: Here’s What it Means*, N.Y. TIMES (July 28, 2019), <https://www.nytimes.com/2019/07/28/world/americas/guatemala-safe-third-asylum.html> [https://perma.cc/ZWL2-ZSGZ].

86. *Id.*

actually a safe third country agreement.<sup>87</sup> In September 2019, there was a similar announcement about an agreement with El Salvador that turned out not to be a safe third country agreement.<sup>88</sup> Both the transit rule and any safe third country agreements would create additional barriers to asylum.

Just as the Trump Administration has adopted regulations and policies to block access to asylum, it has also made severe cutbacks to refugee admissions. The U.S. Refugee Admissions Program has existed for nearly forty years. Under the Immigration and Nationality Act, the President determines the number of refugees to be admitted each year, with the advice and consent of Congress.<sup>89</sup> When Obama left office, the ceiling on refugee admissions was 110,000.<sup>90</sup> Since taking office, Trump has slashed the cap on refugee admissions each year, from 50,000 in 2017 to 45,000 in 2018 to 30,000 in 2019, an all-time low.<sup>91</sup> Yet even this limited number of refugees was not admitted. In FY 2018, only 22,491 refugees were actually admitted to the United States.<sup>92</sup> The Trump Administration is considering further cutbacks for 2020, with some officials even proposing that zero refugees be admitted.<sup>93</sup> Meanwhile, the number of refugees worldwide is at a historic high of nearly twenty-six million.<sup>94</sup>

The other branches of government should intervene to protect the rights of asylum seekers and refugees. Congress can help turn around the drastic reduction in refugee admissions by advising the President against it and refusing to consent to cutbacks. What would happen if the number of refugees we admitted actually reflected the wealth of the United States compared to other countries? Or if we compensated developing countries where a disproportionate number of the world's refugees currently live?

As for the numerous changes to the asylum system discussed above, which are being actively litigated, the courts hold the special responsibility of protecting statutory and constitutional rights and should reject arbitrary or unreasonable rules and policy changes that threaten to undermine the entire system of protection. The Seventh Circuit recently did this in the most vehement way,

87. Susan Gzesh, *Questions Surround Secretive US-Guatemala Agreement*, JUST SECURITY (July 30, 2019), <https://www.justsecurity.org/65203/us-guatemala-plan-is-not-a-safe-third-country-agreement/> [<https://perma.cc/43A5-5Z94>].

88. Zolan Kanno-Youngs & Elisabeth Malkin, *U.S. Agreement with El Salvador Seeks to Divert Asylum Seekers*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/us/politics/us-asylum-el-salvador.html> [<https://perma.cc/M46D-L9LP>].

89. Refugee Act of 1980, Pub. L. No. 96-212, § 207(a)(2)–(3), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1157(a)(2)–(3) (2018)).

90. Ted Hesson, *Trump Administration Nearly Halves Refugee Cap for Coming Year*, POLITICO (Sept. 26, 2019, 5:41 PM), <https://www.politico.com/news/2019/09/26/trump-administration-cuts-refugee-cap-to-18-000-for-coming-year-003885> [<https://perma.cc/6NRN-8B7F>].

91. *Id.*

92. Jennifer Hansler, *US Admits Lowest Number of Refugees in More than 40 Years*, CNN (Oct. 3, 2018, 6:08 PM), <https://www.cnn.com/2018/10/02/politics/us-refugees-fy18/index.html> [<https://perma.cc/CZE7-XPZS>].

93. See Julie Hirschfeld Davis & Michael D. Shear, *Trump Administration Considers a Drastic Cut in Refugees Allowed to Enter U.S.*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/us/politics/trump-refugees-united-states.html> [<https://perma.cc/AN9E-J2V8>].

94. *Figures at a Glance*, U.N. HIGH COMM'R FOR REFUGEES (June 19, 2019), <https://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/DF8C-LSUF>].

rebuking the Board of Immigration Appeals for its blatant “defiance of a remand order”<sup>95</sup> in following the words of the Attorney General instead of the court’s opinion and denying a second remand due to the Board’s “obduracy,” “disdain[,],” and “effrontery.”<sup>96</sup> The court reminded the Board in no uncertain terms that “the ‘Judicial Power’ under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government.”<sup>97</sup>

## V. THE RESURGENCE OF RACISM, XENOPHOBIA, AND WHITE NATIONALISM

Racism and xenophobia have existed in the United States and affected the country’s immigration policies for centuries.<sup>98</sup> In recent decades, biases against Muslims, Mexicans, and Central Americans have had a particularly strong impact on immigrant communities. In 2012, for example, the Department of Justice found that the Sheriff of Alamance County, North Carolina, engaged in a pattern or practice of discriminatory policing of Latinos in violation of the Equal Protection Clause.<sup>99</sup> In 2013, a federal court found that Joe Arpaio, the Sheriff of Maricopa County, Arizona, relied on racial profiling and illegal detention to target Latinos.<sup>100</sup>

Under the Trump Administration, explicit discrimination and xenophobic fearmongering have been a central part of the President’s rhetoric, fueling a rise in white nationalism.<sup>101</sup> Trump has described immigrants from Mexico and Central America as criminals, drug dealers, rapists, murderers, gang members, fraudsters, and animals who “prey on our citizens”<sup>102</sup> and “infest” our country.<sup>103</sup>

95. *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035 (7th Cir. 2020) (holding that the Board of Immigration Appeals could not disregard the court’s mandate and reinstating the immigration judge’s order granting a waiver of inadmissibility for a U visa).

96. *Id.* at 1036–37.

97. *Id.* at 1036.

98. See, e.g., Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (imposing racially-based national origin restrictions) (repealed in part in 1980); Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 876 (establishing an Asiatic Barred Zone) (repealed 1952); Chinese Exclusion Act, Pub. L. No. 47-126, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943); Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103 (limiting naturalization to free white persons) (repealed 1795).

99. Press Release, U.S. Dep’t of Justice, Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff’s Office (Sept. 18, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-alamance-county-nc-sheriff-s-office> [https://perma.cc/XR4E-7EQC].

100. Press Release, Am. Civil Liberties Union, Federal Court Rules Arizona Sheriff Joe Arpaio Violated U.S. Constitution (May 24, 2013), <https://www.aclu.org/press-releases/federal-court-rules-arizona-sheriff-joe-arpaio-violated-us-constitution> [https://perma.cc/H9Z7-5CL7].

101. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197–200 (2019).

102. Philip Bump, *Here’s Everything Donald Trump Said About Immigration in His Speech to Congress*, WASH. POST (Mar. 1, 2017, 11:23 AM), [https://www.washingtonpost.com/news/politics/wp/2017/03/01/heres-everything-donald-trump-said-about-immigration-in-his-speech-to-congress/?utm\\_term=.c980fed2bf4](https://www.washingtonpost.com/news/politics/wp/2017/03/01/heres-everything-donald-trump-said-about-immigration-in-his-speech-to-congress/?utm_term=.c980fed2bf4) [https://perma.cc/EW7A-HKP3].

103. David A. Graham, *Trump Says Democrats Want Immigrants to ‘Infest’ the U.S.*, ATLANTIC (June 19, 2018), <https://www.theatlantic.com/politics/archive/2018/06/trump-immigrants-infest/563159/> [https://perma.cc/3TEM-FZB7].

He stated that he prefers immigrants from Norway instead of those from “shithole countries” like Haiti, El Salvador, and African nations.<sup>104</sup> Furthermore, when asked about immigration to Europe, he described cultural change as “a very negative thing”<sup>105</sup> and tweeted, “We don’t want what is happening with immigration in Europe to happen with us!”<sup>106</sup>

After running on a campaign promising a “total and complete shutdown of Muslims entering the United States” and calling Islam the “enemy,”<sup>107</sup> Trump issued an executive order within days of his election that banned citizens of several Muslim-majority countries from entering the United States.<sup>108</sup> As court challenges ensued, he modified the ban twice. The third version was ultimately upheld by the Supreme Court despite compelling evidence that animus against Muslims motivated the ban. The Court found that as long as the government could offer a reason for the ban that was not unconstitutional, i.e., that it was not motivated solely by animus, the Establishment Clause was not violated.<sup>109</sup> Because the government asserted national security justifications that were “plausibly related” to the ban, the Court upheld it.<sup>110</sup>

Biases against Mexicans, Central Americans, and minorities from developing countries more generally have likewise fueled some of the most significant changes in immigration policies under Trump. These include not only the changes to the asylum system described above but also the decisions to rescind Deferred Action for Childhood Arrivals (DACA)<sup>111</sup> and to terminate Temporary Protected Status (TPS) for El Salvador, Nicaragua, Haiti, Sudan, and other countries.<sup>112</sup> Lawsuits challenging the rescission of DACA and termination of TPS have raised Equal Protection Clause claims based on evidence of racial animus, as well as arguments

104. John Bowden, *Blumenthal: Trump's 'S-hole' Comment Is 'Racism Masquerading Poorly as Immigration Policy'*, HILL (Jan. 11, 2018, 7:21 PM), <https://thehill.com/blogs/blog-briefing-room/news/368628-blumenthal-trumps-s-hole-comment-is-racism-masquerading-poorly> [<https://perma.cc/WLT2-TT27>]; see also Mike Lillis, *Hoyer: Trump's Immigration Comments Are 'Racist' and a 'Disgrace'*, HILL (Jan. 11, 2018, 11:32 PM), <https://thehill.com/homenews/house/368652-hoyer-trumps-immigration-comments-are-racist-and-a-disgrace> [<https://perma.cc/W5DM-28TE>].

105. John Wagner, *Trump: Immigration Is 'Changing the Culture' of Europe and Its Leaders 'Better Watch Themselves'*, WASH. POST (July 13, 2018, 11:22 AM), [https://www.washingtonpost.com/politics/trump-immigration-is-changing-the-culture-of-europe-and-its-leaders-better-watch-themselves/2018/07/13/afb5d9a6-868b-11e8-8f6c-46cb43e3f306\\_story.html?utm\\_term=.777d08db64a3](https://www.washingtonpost.com/politics/trump-immigration-is-changing-the-culture-of-europe-and-its-leaders-better-watch-themselves/2018/07/13/afb5d9a6-868b-11e8-8f6c-46cb43e3f306_story.html?utm_term=.777d08db64a3) [<https://perma.cc/2JKA-E63S>].

106. Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2018, 8:04 AM), <https://twitter.com/realdonaldtrump/status/1008696952559734787> [<https://perma.cc/W8FB-BC4G>].

107. Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, WASH. POST, [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.13bae7e8c34f](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.13bae7e8c34f) [<https://perma.cc/4D2K-WB62>] (last updated Dec. 7, 2015, 7:43 PM).

108. Exec. Order No. 13,769, *Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8977 (Jan. 27, 2017); see Khaled A. Beydoun, *The Ban and the Borderlands Within: The Travel Ban as a Domestic War on Terror Tool*, 71 STAN. L. REV. ONLINE 251, 251 (2019).

109. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2416–18, 2423 (2018).

110. *Id.* at 2420.

111. Over 90% of DACA recipients are Latino. Srikantiah & Sinnar, *supra* note 101, at 201.

112. *Id.* at 200.



under the Due Process Clause and Administrative Procedure Act (APA).<sup>113</sup> The Supreme Court granted certiorari to consider the rescission of DACA<sup>114</sup> and heard arguments in the case on November 12, 2019.<sup>115</sup> Similarly, the Trump Administration's decision to expand the definition of a "public charge," which would prevent thousands of noncitizens from being admitted to the United States and becoming permanent residents, has been challenged as intentionally discriminating against Latinos and immigrants of color.<sup>116</sup>

Courts will need to consider the animus allegations and equal protection challenges raised in these cases carefully. At the same time, the public must continue repudiating rhetoric rooted in xenophobia and racism. There is a risk of normalizing these expressions of animus and growing numb. But resisting that tendency is essential to creating and maintaining an inclusive and diverse culture.

Transforming the lives of immigrants in the United States requires reimagining what is possible. Immigrant rights organizers and advocates tend to be far ahead of lawyers and law professors in this regard. Instead of just demanding better training for ICE and CBP officers to address racial and xenophobic violence, perhaps we need to restructure these agencies from the ground up, make special visas available for members of historically subordinated groups, or apply strict scrutiny to immigration classifications based on race, nationality, and religion.

## VI. CONCLUSION

We are facing a multipronged attack against immigrants that involves manufacturing a crisis to support a mindset of detention and enforcement; criminalizing immigrants; invoking fears of a racial, cultural, and security threat; stoking economic anxiety; equating the "rule of law" with deportation; and denigrating courts. We must therefore respond with a multipronged strategy that is not limited to tinkering with the edges of the law. We must offer a positive vision for immigrants in American society, one that builds power and attacks a structure of inequality sustained by racism that benefits from the labor of immigrants while denying them basic rights.

113. See *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 476, 518–20 (9th Cir. 2018) (discussing the Equal Protection claims challenging the rescission of DACA and denying the government's motion to dismiss them), *cert. granted*, 139 S. Ct. 2779 (2019); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098, 1105 (N.D. Cal. 2018) (granting a preliminary injunction in a case challenging the termination of TPS designations for El Salvador, Haiti, Nicaragua, and Sudan and finding a likelihood of success on the APA claims as well as "serious questions on the merits of the Equal Protection Claim"); *NAACP v. Trump*, 315 F. Supp. 3d 457, 460–61 (D.D.C. 2018) (finding DACA rescission unlawful under the APA); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018) (granting a preliminary injunction against DACA rescission on APA grounds).

114. *In re United States*, 138 S. Ct. 443 (2017) (per curiam).

115. See Transcript of Oral Argument, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019) (No. 18-587), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-587\\_886a.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-587_886a.pdf) [<https://perma.cc/7SHT-4JHL>].

116. Nicole Acevedo, *New York, Connecticut and Vermont Sue to Block Trump's Public Charge Rule*, NBC NEWS (Aug. 20, 2019, 10:27 AM), <https://www.nbcnews.com/news/latino/new-york-connecticut-vermont-sue-block-trump-s-public-charge-n1044276> [<https://perma.cc/6S6F-D4XL>].